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DEPARTMENT OF LABOR

Employment and Training Administration

Labor Certification Process for the Temporary Employment of H-2A and H-2B Foreign Workers in the United States: Annual Update to Allowable Charges for Agricultural Workers' Meals and for Travel Subsistence Reimbursement, Including Lodging

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The United States Department of Labor (DOL) is issuing this Notice to announce the annual update to: (1) the allowable charges that employers seeking H-2A workers in occupations other than herding or production of livestock on the range may charge their workers when the employer provides three meals per day; and (2) the maximum travel subsistence meal reimbursement that a worker with receipts may claim under the H-2A and H-2B programs. The Notice also includes a reminder regarding employers' obligations with respect to overnight lodging costs as part of required subsistence.

DATE: This notice is applicable on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, U.S. Department of Labor, Box PPII 12-200, 200 Constitution Avenue, NW, Washington, DC 20210, 202-513-7350 (this

is not a toll-free number) or, for individuals with hearing or speech impairments, 1-877-889-5627 (this is the TTY toll-free Federal Information Relay Service number).

SUPPLEMENTARY INFORMATION:

The U.S. Citizenship and Immigration Services of the Department of Homeland Security will not approve an employer's petition for the admission of H-2A or H-2B nonimmigrant temporary workers in the United States unless the petitioner has received from DOL an H-2A or H-2B labor certification. *See* 8 CFR § 214.2(h)(5) and (h)(6). Both the H-2A and H-2B labor certifications generally provide that: (1) there are not sufficient U.S. workers who are qualified and who will be available to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. *See* 20 CFR §§ 655.1(a) and 655.100.

Allowable Meal Charge

H-2A agricultural employers of workers in occupations other than herding or production of livestock on the range must offer and provide each worker three meals per day or provide the workers free and convenient cooking facilities.¹ *See* § 655.122(g). Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. *Id.* The amount of meal charges is governed by § 655.173.

By regulation, the DOL has established the methodology for determining the maximum amount that H-2A agricultural employers may charge workers for providing them with three meals per day. *See* § 655.173(a). This methodology allows for annual adjustments of the previous year's maximum allowable charge based on the updated

¹ H-2A employers must provide workers engaged in herding or the production of livestock on the range meals or food to prepare meals without charge or deposit charge. *See* 20 CFR § 655.210(e).

Consumer Price Index for All Urban Consumers for Food (CPI-U for Food), not seasonally adjusted. *Id.* The maximum amount employers may charge workers for providing meals is adjusted annually by the 12-month percentage change in the CPI-U for Food for the prior year (i.e., between December of the year just concluded and December of the prior year). *Id.* The Office of Foreign Labor Certification (OFLC) Certifying Officer may also permit an employer to charge workers a higher amount for providing them with three meals a day, if the higher amount is justified and sufficiently documented by the employer, as set forth in § 655.173(b).

The percentage change in the CPI-U for Food between December 2017 and December 2018 was 1.6 percent.² Thus, the annual update to the H-2A allowable meal charge is calculated by multiplying the current allowable meal charge (\$12.26)³ by the 12-month percentage change in the CPI-U for Food between December 2017 and December 2018 ($\$12.26 \times 1.016 = \12.46). Accordingly, the updated maximum allowable charge under §§ 655.122(g) and 655.173 is \$12.46 per day, and an employer is not permitted to charge a worker more than \$12.46 per day unless the OFLC Certifying Officer approves a higher charge, as authorized under § 655.173(b).

Reimbursement for Travel-Related Subsistence

Under the following conditions, H-2B and H-2A employers must pay the reasonable travel and subsistence costs, including the costs of meals and lodging, incurred by workers during travel to the worksite from the place from which the worker has come to work for the employer and from the place of employment to the place from which the

² Consumer Price Index—December 2018, published January 11, 2019 at https://www.bls.gov/news.release/archives/cpi_01112019.pdf.

³ In 2018, the maximum allowable charge under 20 CFR §§ 655.122(g) and 655.173 was \$12.26 per day. 83 FR 12410 (Mar. 21, 2018).

worker departed to work for the employer, as well as any such costs incurred by the worker incident to obtaining a visa authorizing entry to the U.S. for the purpose of H-2A or H-2B employment. *See* §§ 655.122(h)(1)-(2) and 655.20(j)(1)(i)-(ii). Specifically, an H-2A employer is responsible for providing, paying in advance, or reimbursing a worker for the reasonable costs of daily travel-related subsistence between the employer's worksite and the place from which the worker has come to work for the employer, if the worker completes 50 percent of the work contract period, and must provide (or pay at the time of departure) the worker's return costs, upon the worker completing the contract or being dismissed without cause. *See* § 655.122(h)(1)-(2). Similarly, an H-2B employer is responsible for providing, paying in advance, or reimbursing a worker for the reasonable costs of transportation and daily subsistence between the employer's worksite and the place from which the worker has come to work for the employer, if the worker completes 50 percent of the job order period, and upon the worker completing the job order period or being dismissed early (for any reason), return costs. *See* § 655.20(j)(1)(i)-(ii).

The minimum amount of daily travel subsistence expense for meals, for which a worker is entitled to reimbursement, must be at least as much as the employer would charge for providing the worker with three meals per day during employment (if applicable). In no circumstances may the employer reimburse workers less than the amount permitted under § 655.173(a) (i.e., the current year's daily meal charge amount of \$12.46). The maximum amount an employer is required to reimburse workers for daily travel-related subsistence, as evidenced with receipts, is equal to the standard Continental United States (CONUS) per diem rate, as established by the General Services Administration (GSA) at 41 CFR Part 301, formerly published in Appendix A,

and now found at <https://www.gsa.gov/travel/plan-book/per-diem-rates>. *See, e.g.*, Annual Update to Allowable Charges for Agricultural Workers' Meals and for Travel Subsistence Reimbursement, Including Lodging, 83 FR 12410 (Mar. 21, 2018) (2018 Update). The standard CONUS meals and incidental expenses rate is \$55.00 per day for 2019.⁴ Workers who qualify for travel reimbursement are entitled to reimbursement for meals up to the standard CONUS meals and incidental expenses rate when they provide receipts. In determining the appropriate amount of reimbursement for meals for less than a full day, the employer may limit the meal expense reimbursement, with receipts, to 75 percent of the maximum reimbursement for meals, or \$41.25, based on the GSA per diem schedule. *See, e.g.*, 2018 Update, 83 FR at 12411. If a worker does not provide receipts, the employer is not obligated to reimburse above the minimum stated at § 655.173, as specified above.

If transportation and lodging are not provided by the employer, the amount an employer must pay for transportation and, where required, lodging, must be no less than (and is not required to be more than) the most economical and reasonable costs. The employer is responsible for those costs necessary for the worker to travel to the worksite if the worker completes 50 percent of the work contract period but is not responsible for unauthorized detours. The employer also is responsible for the costs of return transportation and subsistence, including lodging costs where necessary, as described above. These requirements apply equally to instances where the worker is traveling within the U.S. to the employer's worksite. *See* §§ 655.122(h)(1)-(2) and 655.20(j)(1)(i)-(ii).

⁴ Maximum Per Diem Reimbursement Rates for the Continental United States (CONUS), 83 FR 42501 (August 22, 2018); *see also* <https://www.gsa.gov/travel/plan-book/per-diem-rates/mie-breakdown>.

For further information on when the employer is responsible for lodging costs, please see the DOL's H-2A Frequently Asked Questions on Travel and Daily Subsistence, which may be found on the OFLC website: <https://www.foreignlaborcert.doleta.gov/>.

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